THE HONORABLE MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOSH AUXIER AND COLEEN AUXIER, Plaintiffs, v. SUTTELL & HAMMER, P.S.; FREDERICK J. HANNA & ASSOCIATES, P.C.; NORTHSTAR LOCATION SERVICES, LLC, Defendants, FIA CARD SERVICES, N.A. a/k/a BANK OF AMERICA Co-Defendants.	No. C12-0288 MJP **DEFENDANT FIA CARD SERVICES, N.A.'S MOTION TO DISMISS** NOTED FOR CONSIDERATION: **Friday, August 10, 2012**

I. INTRODUCTION

In their First Amended Complaint ("Amended Complaint"), Plaintiffs Coleen and Josh Auxier ("Plaintiffs") argue that they should be relieved of responsibility for more than forty-five thousand dollars ($45,000) of credit card debt they incurred over a span of nine years. Plaintiffs' claims as to Defendant FIA Card Services, N.A.[1] ("FIA") is predicated upon three allegations: (1) that FIA inaccurately reported to credit bureaus that Plaintiffs were delinquent on the credit card account (the "Account"); (2) that FIA failed to notify credit bureaus that Plaintiffs disputed the debt on the Account; and (3) that FIA failed to "oversee the [debt

[1] Also erroneously sued as "Bank of America."

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collection] activities" of its collection agents. Based on these allegations, Plaintiffs assert two causes of action against FIA: (1) violation of the federal Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681s-2(a); and (2) violation of the Washington Consumer Protection Act ("CPA"), RCWA § 19.86.020 *et seq*. Both of Plaintiffs' claims fail.

Importantly, FIA cannot be liable for reporting inaccurate information regarding the Account to credit bureaus because King County Superior Court already issued a final judgment on the merits holding that Plaintiff Coleen Auxier is liable for the entire debt due on the Account. As such, the doctrine of collateral estoppel precludes Plaintiffs' contention that FIA reported inaccurate information about the Account. Moreover, Plaintiffs' FCRA claim fails as a matter of law because Section 1681s-2(a) does not provide Plaintiffs with a private right of action to sue under that subdivision of the FCRA.

Plaintiffs' second cause of action under the CPA must suffer a similar fate because: (1) it is well settled that FIA cannot be vicariously liable for its collection agents' debt collection activity under the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq*.; (2) Plaintiffs' claim under Section 1681b of the FCRA fails as a matter of law with respect to all of the defendants in this lawsuit because Plaintiffs have not alleged facts to support an improper purpose in obtaining credit reports; and (3) Plaintiffs do not — and cannot — allege that FIA's alleged failure to oversee its agents' collection of Plaintiffs' debt had the capacity to deceive a substantial portion of the public, or that FIA's alleged oversight had an impact on the public interest at large.

Accordingly, FIA respectfully requests that this Court grant its Motion to Dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) without leave to amend. A proposed order accompanies this Motion.

II. SUMMARY OF FACTUAL ALLEGATIONS

In their Amended Complaint, Plaintiffs allege that FIA, as a creditor of Plaintiffs, reported "erroneous and inaccurate information" to credit bureaus with respect to a credit card account with FIA (the "Account") on the ground that Plaintiffs are not liable for the Account.

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Am. Compl. at 3:2-18. Plaintiffs also allege that FIA failed to notify the credit bureaus that Plaintiffs disputed the debt owed on the Account. *Id.* at 25:18-19. Plaintiffs further claim that the debt collector defendants — Northstar Location Servicies, LLC ("Northstar"), Suttell & Hammer, P.S. ("Suttell & Hammer"), and Frederick J. Hanna & Associates ("Frederick J. Hanna") — engaged in unlawful debt collection activity in violation of the FDCPA, and impermissibly obtained Plaintiffs' credit report in violation of Section 1681b of the FCRA. *Id.* at 7:14-15:9. Plaintiffs assert that FIA failed to "oversee the activities" of these debt collector agents in violation of the Washington Consumer Protection Act. *Id.* at 31:20-22.

On March 9, 2012, the Superior Court of Washington, King County, entered judgment against Plaintiff Coleen Auxier in a lawsuit filed by FIA to collect the amount due on the Account (the "Collection Action"). Declaration of Daniel A. Kittle ("Kittle Decl.") Ex. A (Order); Am. Compl. at 16:18-19. In the Collection Action, FIA moved for summary judgment, and Ms. Auxier opposed the motion, arguing that she was not liable for the debt on the Account. Kittle Decl. Ex. A (Order). Notably, both Ms. Auxier and Mr. Auxier appeared at the hearing on FIA's motion for summary judgment and argued that they were not liable for the debt. *Id.* The court granted FIA's motion, concluding that there was "no genuine issue as to any material fact" that Plaintiff Coleen Auxier owed the debt. *Id.* at 2.

III. LEGAL ARGUMENTS

A. Legal Standard

Federal Rule of Civil Procedure 8(a)(2) requires a plaintiff to provide "'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant[s] fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 546, 127 S. Ct. 1955, 1959 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99 (1957)). Claims that fail to meet this standard must be dismissed under Federal Rule of Civil Procedure 12(b)(6).

While this standard does not require heightened fact pleading, it does require that a complaint contain sufficient factual allegations, which, if accepted as true, state a claim for

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relief "'that is plausible on its face.'" *Ashcroft v. Iqbal*, --- U.S. ---, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)). Where, however, plaintiffs fail to "nudge[] their claims across the line from conceivable to plausible, their complaint must be dismissed." *Twombly*, 550 U.S. at 1974. This "plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.* at 1949 (quoting *Twombly*, 550 U.S. at 556-57). Indeed, where there is an "obvious alternative explanation" for the conduct alleged, the complaint should be dismissed. *Iqbal*, 129 S. Ct. at 1951. Therefore, to survive a motion to dismiss under Rule 12(b)(6), plaintiffs must provide more than just "labels and conclusions"; rather, they must provide the grounds of his entitlement to relief. *Twombly*, 550 U.S. at 555 ("formulaic recitation of the elements of a cause of action will not do."). In addition, where it is clear amendment would be futile, the court may dismiss the Complaint without leave to amend. *See Havas v. Thorton*, 609 F.2d 372 (9th Cir. 1979).

Here, as discussed below, Plaintiffs have not "nudged" their claims "across the line from conceivable to plausible." *Iqbal*, 129 S.Ct. at 1951 (*citing Twombly*, 550 U.S. at 570, 127 S.Ct. 1955). Accordingly, and because no amendment will cure the deficiencies in Plaintiffs' claims, the Court should grant FIA's Motion to Dismiss without leave to amend.

B. The Court May Consider Public Records Without Converting this Motion to a Motion for Summary Judgment.

Pursuant to Federal Rule of Evidence 201, the "court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Federal Rule of Evidence 201(b). Notably, the Court may "take judicial notice of facts that are a matter of public record" without converting a

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motion to dismiss under Fed. R. Civ. P. 12(b)(6) into a motion for summary judgment. *Lee v. City of Los Angeles*, 250 F. 3d 668, 689 (9th Cir. 2001).

Accordingly, a court "may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue." *U.S. ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992) (quotations omitted). Courts take judicial notice of pleadings from prior litigation to determine whether a plaintiff's claims are barred by collateral estoppel. *See, e.g., Haddad v. Dudek*, 784 F. Supp. 2d 1308, 1324 (M.D. Fla. 2011); *Seirus Innovative Accessories, Inc. v. Gordini U.S.A., Inc.*, --- F. Supp. 2d ---, 10-cv-0892 H WMC, 2012 WL 368044, at *21 (S.D. Cal., Feb. 3, 2012); *Swiatkowski v. Citibank*, 745 F. Supp. 2d 150, 156, 168 (E.D.N.Y. 2010), *aff'd*, 446 F. App'x 360 (2d Cir. 2011).

FIA respectfully requests that the Court take judicial notice of Exhibit A to the Kittle Declaration for purposes of collateral estoppel, which is an Order from King County Superior Court granting FIA's motion for summary judgment in the Collection Action.

C. Plaintiff's FCRA Claim Fails as a Matter of Law

1. Section 1681s-2(a) of the FCRA Does Not Provide For a Private Right of Action

Plaintiffs allege that FIA willfully violated Section 1681s-2(a) of the FCRA by reporting inaccurate information to credit bureaus and failing to notify credit bureaus that Plaintiffs disputed the Account. Amended Compl. at 25:14-26:19; 27:16-28:5, 29:6-8. Plaintiffs' claim fails because Section 1681s-2(a) does not provide consumers with a private right of action.

Section 1681s-2(a) "imposes a duty on 'furnishers of information' to provide accurate information to consumer reporting agencies" and a "[d]uty to provide notice of dispute . . . [i]f the completeness or accuracy of any information furnished by any person to any consumer reporting agency is disputed[.]" 15 U.S.C. § 1681s-2(a)(1)(A), (a)(3). However, Subdivision (a) of Section 1681s-2 does ***not*** provide consumers a private right of action to seek relief under

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its provisions. *See, e.g., Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147, 1154 (9th Cir. 2009) ("Duties imposed on furnishers under subsection (a) are enforceable only by federal or state agencies[.]"); *Townsend v. Bank of America, N.A.*, 2011 WL 3267299, at 1 (9th Cir. 2011) ("The district court properly dismissed the FCRA claims because there is no private right of action under 15 U.S.C. § 1681s–2(a)"). Only specified federal and state agencies may enforce Section 1681s-2(a). 15 U.S.C. § 1681s-2(d).

Plaintiffs allege that FIA violated Section 1681s-2(a) of the FCRA. Because Section 1681s-2(a) does not provide for a private right of action, Plaintiffs' FCRA claim against FIA fails as a matter of law.

2. The Doctrine of Collateral Estoppel Bars Plaintiff's FCRA Claim

Plaintiffs claim that FIA violated the FCRA in part by reporting "erroneous and inaccurate information" regarding Plaintiffs' liability for the Account. Am. Compl. 25:20-22. However, because the King County Superior Court already determined in a final judgment on the merits that Plaintiffs are liable for the Account, any such alleged reporting cannot be erroneous as a matter of law. Thus, Plaintiffs' claim for erroneous reporting under the FCRA also fails based on collateral estoppel.

"Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *See, e.g.*, *Dodd v. Hood River County,* 59 F.3d 852, 863 (9th Cir. 1995). "The collateral estoppel doctrine promotes judicial economy and serves to prevent inconvenience or harassment of parties." *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wash.2d 299, 306 (2004). "For collateral estoppel to apply, the party seeking application of the doctrine must establish that (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding, (2) the earlier proceeding ended in a judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding, and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied." *Id.* at 307.

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a. The Issue of Whether Plaintiffs Are Liable for the Account Was Already Litigated in State Court

Plaintiffs allege that FIA is liable under the FCRA for inaccurately reporting to the credit bureaus that Plaintiffs are liable for the Account. On March 9, 2012, at the hearing on FIA's summary judgment motion in the Collection Action, Plaintiffs and FIA presented oral arguments on the issue of whether Plaintiffs were liable for the Account. Kittle Decl. Ex. A at 2 (Order). Based on all of the evidence presented by both parties — including Plaintiffs' Response in Opposition to FIA's Motion for Summary Judgment, as well as Plaintiffs' exhibits and declaration in support thereof — the court ruled in favor of FIA and held that Plaintiff Coleen Auxier was liable for the Account.

b. The Collection Action Ended With a Final Judgment on the Merits in Favor of FIA

On March 9, 2012, the court in the Collection Action entered judgment in favor of FIA for the full balance due on the Account. Kittle Decl. Ex. A (Order); Am. Compl. at 16:18-19. The court entered judgment in the amount of $45,199.32, holding that there was "no genuine issue as to any material fact" that Plaintiff Coleen Auxier owed the debt on the Account, and thereby granted FIA judgment as a matter of law. Kittle Decl. Ex. A at 2 (Order).

c. Plaintiffs Were Parties in the Collection Action

Plaintiff Coleen Auxier was a party in the Collection Action. Kittle Decl. Ex. A at 2 (Order). Plaintiff Josh Auxier is Coleen Auxier's husband and part of the marital community thereof, and Mr. Auxier also appeared at the summary judgment hearing on the March 9, 2012 to argue that Plaintiffs were not liable on the Account. *Id.* ("At oral argument, defendant [Coleen Auxier] appeared with her husband and both were permitted to address the court.").

d. Application of Collateral Estoppel Will Not Create Injustice

The application of collateral estoppel will not create injustice in this case. "The injustice component is generally concerned with procedural, not substantive irregularity. This is consistent with the requirement that the party against whom the doctrine is asserted must have had a full and fair opportunity to litigate the issue in the first forum. Accordingly,

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applying collateral estoppel may be improper where the issue is first determined after an informal, expedited hearing with relaxed evidentiary standards. In addition, disparity of relief may be so great that a party would be unlikely to have vigorously litigated the crucial issues in the first forum and so it would be unfair to preclude relitigation of the issues in a second forum." *Christensen*, 152 Wash.2d at 309 (internal citations omitted).

Here, Plaintiffs' FCRA claim against FIA is based on the allegation that they are not liable for the Account. This precise issue was fully litigated in King County Superior Court as a part of FIA's Collection Action to collect the past due balance on the Account. Kittle Decl. Ex. A (Order); Am. Compl. at 16:17-19. Plaintiffs had a full and fair opportunity to litigate the issue of whether they were liable on the Account. In opposition to FIA's summary judgment motion, the court considered Ms. Auxier's opposition brief, supporting declaration, and exhibits, and Plaintiffs' oral arguments. Kittle Decl. Ex. A (Order) at 2. The amount in controversy in that lawsuit was more than $40,000, and Plaintiffs vigorously argued that they should not be held liable for the Account. *Id.* Nevertheless, the court ruled in favor of FIA. *Id.* Accordingly, application of collateral estoppel to Plaintiffs' claim regarding the underlying debt would not be unjust, and collateral estoppel therefore bars Plaintiffs' claim that FIA violated the FCRA by reporting that they were liable for the Account.

3. Plaintiffs' Washington Consumer Protection Act Claims Fails as a Matter of Law

a. FIA Cannot Be Vicariously Liable For the Other Defendants' Alleged Violations of the FDCPA or the FCRA

Plaintiffs allege that FIA is liable for violation of the Washington Consumer Protection Act ("CPA") by failing to oversee the collection efforts of Defendants Northstar, Suttell & Hammer, and Frederick J. Hanna. Am. Compl. at 31:20-22. In essence, Plaintiffs claim that FIA violated the CPA because it is vicariously liable for the alleged debt collection activity of those defendants in violation of the FDCPA and Section 1681b of the FCRA.

It is well-established that FIA, as the creditor under the Account, cannot be liable for its' collection agents' alleged misconduct under the FDCPA, which expressly governs the

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conduct of "debt collectors" only. Am. Compl. at 3:6-7; 5:13-14 ("FIA/BofA is a credit lender . . . FIA reputedly claims to be the Creditor."); *Plumb v. Barclays Bank Delaware*, 2012 WL 2046506, at *4 (E.D.Wash. 2012) ("vicarious liability under the FDCPA has been restricted to principals who themselves are statutory 'debt collectors'") (citing *Oei v. N Star Capital Acquisitions, LLC*, 486 F. Supp. 2d 1089, 1097 (C.D. Cal. 2006)); *Havens-Tobias v. Eagle*, 127 F. Supp. 2d 889, 898 (S.D. Ohio 2001) ("Defendant Schwan does not fall into the category of 'debt collector,' as provided by 15 U.S.C. § 1692a(6), but rather is the creditor of Plaintiffs, and, therefore, cannot be held liable, vicariously or otherwise, under the FDCPA."); *Sprague v. Neil*, No. 05-1605, 2007 U.S. Dist. LEXIS 77767, *11 (M.D. Pa. Oct. 19, 2007) ("Federal courts have clearly established that a creditor is not vicariously liable for the actions of its debt collector"); *Frame v. Weltman, Weinberg & Reis*, No. 05-2049, 2006 U.S. Dist. LEXIS 28926, *5 (N.D. Ohio May 12, 2006) ("As a matter of law, the FDCPA does not apply to creditors, their employees or officers, or their affiliates. Further, a creditor cannot be held vicariously liable under the FDCPA for the alleged acts of [the] debt collector it hires"); *Wadlington v. Credit Acceptance Corp.*, 76 F.3d 103, 108 (6th Cir. 1996) ("We do not think it would accord with the intent of Congress, as manifested in the terms of the Act, for a company that is not a debt collector to be held vicariously liable for a collection suit filing that violates the Act only because the filing attorney is a 'debt collector.'"). Accordingly, FIA cannot be vicariously liable for the alleged conduct of its collection agents, and Plaintiffs' CPA claim based on purported violation of the FDCPA therefore fails as a matter of law.

Plaintiffs' attempt to hold FIA liable under the CPA for its agents' purported violations Section 1681b of the FCRA also fails because Plaintiffs' FCRA claim fails with respect to all defendants as a matter of law. In their Amended Complaint, Plaintiffs allege that Defendants Northstar and Frederick J. Hanna violated Section 1681b of the FCRA by obtaining Plaintiffs' credit reports without a permissible purpose. Am. Compl. at 20:5-11, 23:4-11. Pursuant to Section 1681b subdivisions (a) and (f), a consumer report may be obtained if the person:

> [I]ntends to use the information in connection with a credit transaction involving

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> the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or . . . otherwise has a legitimate business need for the information-- (i) in connection with a business transaction that is initiated by the consumer; or (ii) to review an account to determine whether the consumer continues to meet the terms of the account.

15 U.S.C. §§ 1681b(a)(3); 1681b(f).

Here, Plaintiffs maintained a credit card account with FIA beginning in 2003. Kittle Decl. Ex. A. Therefore, FIA and its alleged collection agents had a permissible purpose to inquire into Plaintiffs' credit and obtain a credit report as provided by the FCRA, i.e. "review or collection of an account," and "a legitimate business need . . . to review an account to determine whether the consumer continues to meet the terms of the account." 15 U.S.C. §§ 1681b(a)(3); 1681b(f). Accordingly, Plaintiffs' FCRA claim for purported violation of Section 1681b fails as a matter of law with respect to all defendants. Because FIA cannot be vicariously liable under the FDCPA or the FCRA for the alleged conduct of its collection agents, Plaintiffs' Washington CPA claim against FIA fails as a matter of law.

b. FIA Did Not Engage in Unfair or Deceptive Conduct

Moreover, Plaintiffs also have not alleged facts sufficient to state an independent CPA claim against FIA. The CPA prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." RCWA § 19.86.020. To state a private claim under the CPA, a plaintiff must allege, with sufficient factual support: (1) an unfair or deceptive act or practice; (2) that occurs in trade or commerce; (3) an impact on the public interest; (4) injury to the plaintiff in his or her business or property; and (5) a causal link between the unfair or deceptive act and the injury suffered. *See Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 785, 719 P.2d 531 (1986). The failure to establish even one of these elements is fatal to a plaintiff's claim. *Id.* at 793. Whether a defendant's conduct is an unfair or deceptive act or practice may be determined as a question of law. *Micro Enhancement Intern., Inc. v. Coopers & Lybrand, LLP*, 110 Wn. App. 412, 438 (2002). Even accepting the allegations in Plaintiffs' Complaint as true, Plaintiffs cannot

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establish a CPA claim.

"The [first] two elements [of a CPA claim] may be established by a showing that (1) an act or practice which has a ***capacity to deceive a substantial portion of the public*** (2) has occurred in the conduct of any trade or commerce." *Hangman Ridge Training Stables, Inc.*, 105 Wn.2d at 785-86 (emphasis added). Here, Plaintiffs do not allege that FIA's alleged failure to oversee its agents' collection activity on Plaintiffs' Account had the capacity to deceive "a substantial portion of the public." Even assuming Plaintiffs' allegations as true, FIA's alleged oversight would affect Plaintiffs only, and no one else.

Moreover, Plaintiffs' Amended Complaint fails to establish the third element of a CPA claim — that FIA's alleged oversight had an impact on the public interest. The public interest element may be established by showing "(1) the defendant by unfair or deceptive acts or practices in the conduct of trade or commerce has induced the plaintiff to act or refrain from acting; (2) the plaintiff suffers damage brought about by such action or failure to act; and (3) the defendant's deceptive acts or practices have the potential for repetition." *Id.* at 789. "Where the transaction was essentially a private dispute . . . [such as] (attorney-client) . . . (insurer-insured) . . . (realtor-property purchaser) . . . (escrow closing agent-client), it may be more difficult to show that the public has an interest in the subject matter." *Hangman Ridge Training Stables, Inc.*, 105 Wash.2d at 790 (internal citations omitted).

Here, FIA's alleged failure to oversee efforts to collect a debt from Plaintiffs did not induce Plaintiffs to act or fail to act. FIA's alleged relationship or conduct with its collection agents did not, and could not, have any impact on Plaintiffs' actions or omissions. Moreover, Plaintiffs allege that they took various steps to contest the alleged debt collection activity of FIA's agents, including sending letters to the agents and FIA to dispute the debt, and filing an opposition to the summary judgment motion in the collection lawsuit against them. Am. Compl. 7:9-13; 8:8-10; 10:6-7; 13:1-5, Exh. 2; 16:12-19. Further, the relationship between FIA and Plaintiffs is a private relationship between a lender and a borrower, so FIA's alleged actions with respect to Plaintiffs could not have an impact on the public interest. Accordingly,

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Plaintiffs' CPA claim fails as a matter of law and should be dismissed with prejudice.

IV. CONCLUSION

Based on the foregoing, FIA respectfully requests that this Court dismiss Plaintiffs' Amended Complaint as to FIA without leave to amend.

DATED this the 9th day of July 2012.

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By *s/Daniel A. Kittle*
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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the United States and the State of Washington that on the 9th day of July, 2012, the foregoing document was presented to the Clerk of the Court for filing and uploading to the CM/ECF system. In accordance with their ECF registration agreement and the Court's rules, the Clerk of the Court will send e-mail notification of such filing to the following persons:

Plaintiff Pro Se:

Josh & Coleen Auxier 19210 3rd Avenue S. Des Moines, WA 98148 Phone: (206) 551-1786 Email: joshandcoleen@gmail.com	☑ ☐ ☐ ☐ ☐ ☐	by **CM/ECF** by **Electronic Mail** by **Facsimile Transmission** by **First Class Mail** by **Hand Delivery** by **Overnight Delivery**

Executed on the 9th day of July, 2012 at Seattle, King County, WA.

By *s/ Daniel A. Kittle*
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